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IN THE

Supreme Court of the United States

October Term, 1966

No. 352

BETTY LEVIN, a holder of Missouri Pacific Railroad Company Class B common stock,

Petitioner,

v.

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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November 23, 1966

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
Questions Presented	2
Statement of the Case	3
Summary	3
The Class A and Class B Stock of MoPac	5
The Class Voting Rights	7
Mississippi's Acquisition of Control	8
The Proposed "Plan of Consolidation"	9
The Present Litigation	11
Summary of Argument	13
Argument:	
I. Section 5(11) of the Interstate Commerce Act conditions approval of the proposed plan upon the separate consent of a majority of the Class B stock	15
A. Railroad unifications under the Interstate Commerce Act are subject to stockholder assent by the vote of a "majority, unless a different vote is required under applicable State law" (49 U.S.C. § 5(11))	15

PAGE

B. The MoPac charter prohibits any alteration or change of class rights except with the separate consent of each class of stock. The proposed plan would alter and change class rights, and is therefore subject to the class voting requirement 18

C. The class vote required by the MoPac charter is the vote "required under applicable [Missouri] law" (49 U. S. C. § 5 (11)).... 22

D. MoPac and Mississippi, having successfully maintained in recent proceedings before the ICC that separate class voting is required for mergers and consolidations of MoPac, are legally barred from repudiating their position and maintaining the contrary in this case 29

II. The proposed plan is not within the scope of Section 5(2) of the Interstate Commerce Act 34

Conclusion 38

Appendix 1a

Citations

CASES:

Assets Realization Co. v. Roth, 226 N. Y. 370, 123 N. E. 743 (1919) 33n

Axelrod v. Osage Oil & Refining Co., 29 F. 2d 712 (8 Cir. 1928) 31-32

Chicago & E. I. Ry. Co. Reorganization, 230 ICC 199, 571 (1938, 1939) 21, 28

Chicago & N. W.—Chicago, Milwaukee, St. Paul & Pac. R. Co. Joint Application [for consolidation] filed June 6, 1966, Finance Docket No. 24182 ..... 27n

PAGE

Cases (Cont'd):

City & County of Denver v. Denver Tramway Corp., 23 F. 2d 287 (8 Cir. 1927) 32
Cleveland C. C. & St. L. Ry. v. Jackson, 22 F. 2d 509 (6 Cir. 1927) 36n
Continental Products Co. v. Com'r of Int. Rev., 66 F. 2d 434 (1 Cir. 1933) 32-33
County of Marin v. United States, 356 U. S. 412 (1958) 14, 34, 35
Cross v. Nee, 18 F. Supp. 589 (W. D. Mo. 1937) .. 19n
Davis v. Wakelee, 156 U. S. 680 (1895) 14, 31
Great Northern R. Co. v. Merchants Elev. Co., 259 U. S. 285 (1922) 12n
Great Northern Pac. & Burl. Lines—Merger—Great Northern Ry. Co., — ICC — (1966), Finance Docket No. 41478, March 31, 1966 36
Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F. 2d 924 (8 Cir. 1965) 17n
Homolla v. Gluck, 248 F. 2d 731 (8 Cir. 1957) 17n
Huey v. Waldrop, 141 Ala. 318, 37 So. 380 (1904) 26n
Illinois Central Railroad Co., et al. v. United States, et al., — F. Supp. — (N. D. Ill. 1966), No. 65 C 1393, August 4, 1966 .....21, 25, 27n, 28, 32
In re Boyd, 213 Fed 774 (2 Cir. 1914) 26n
In re Louisville Gas & Electric Co., 77 F. Supp. 176 (D. Del. 1948) 5n
In re Missouri Pacific Railroad Co., 129 F. Supp. 392 (E. D. Mo. 1955) 5n
Kansas Union Life Ins. Co. v. Burman, 141 F. 835 (8 Cir. 1905) 32
Kern v. Chicago & Eastern Illinois Railroad Co., 31 Ill. App. 2d 300, 307, 175 N. E. 2d 408, 411 (1961) 21

PAGE

Cases (Cont'd):

Lesser v. Wm. Holliday Cord Assoc., Inc., 349 F. 2d 490 (8 Cir. 1965) 17n
Levin v. Hamilton, 240 Mo. App. 764, 218 S. W. 2d 131 (1949) 19n
Louisville & J. B. & R. Co. Merger, Finance Docket No. 18656, ICC Order service date March 7, 1962 (unreported) 29, 29n, 30
Merrick v. Allstate Ins. Co., 349 F. 2d 279 (8 Cir. 1965), cert. denied, 382 U. S. 957 (1966) 17n
Missouri Pac. R. Co. Reorganization, 290 ICC 477 (1954) 5n
Missouri Pacific Railroad Co. 5¼% S.S.B.C. v. Thompson, 225 F. 2d 761 (8 Cir. 1955), cert. denied 350 U. S. 959 (1956) 5n
Missouri Pac. R. Co.—Control—Chicago & Eastern Illinois R. Co., — ICC — (1965), Finance Docket No. 21755, February 16, 1965 21
Moore v. Beiseker, 147 F. 367 (8 Cir. 1906) 32
Norfolk & W. R. Co. Merger, etc., 307 ICC 401, 415 (1959) 27n
Norfolk & W. R. Co. and N. Y., Chicago & St. Louis R. Co. Merger, etc., 324 ICC 1, 32-33, 97 (1964) 27n
Officer v. J. L. Owens Co., 252 F. 337 (8 Cir. 1918) 31
Rochester Telephone Corp. v. United States, 307 U. S. 125 (1939) 30
St. Joe Paper Co. v. Atlantic Coast Line R. Co., 347 U. S. 298 (1954) 15
Scarano v. Central R. Co. of New Jersey, 203 F. 2d 510 (3 Cir. 1953) 33n
Schwabacher v. United States, 334 U. S. 182 (1948) 15, 20n, 27n, 34
Seatrain Lines Inc v. Pennsylvania R. Co., 207 F. 2d 255 (3 Cir. 1953) 33n
Sebastian Bridge Dist. v. Hedrick, 4 F. 2d 346 (8 Cir. 1925) 32

PAGE

CASES (Cont'd):

Sellers v. Joseph Bancroft Sons & Co., 23 Del. Ch. 13, 2 A. 2d 108 (1938) 26n
Smith v. Pacific R.R., 61 Mo. 17 (1875) 23n
Southwestern S. & M. Co. v. River Terminals Corp., 360 U. S. 411 (1959) 12n
Standard Power & Light Corp. v. Investment Associates Inc., 29 Del. Ch. 593, 51 A. 2d 572 (1947) 25n
Taylor v. Fontaine, 10 S. W. 2d 68 (K.C. [Mo.] App. 1928) 31n
United States Fire Ins. Co. v. Cannon, 349 F. 2d 941 (8 Cir. 1965) 17n
Wills v. Kane, 2 Grant's Cas. 60 (Pa. 1853) 31n
Wood v. United States, 132 F. Supp. 586 (S. D. N. Y. 1955) 35

STATUTES:

Interstate Commerce Act:
49 U. S. C. § 5(2) 3, 11, 14, 15, 35, 1a
49 U. S. C. § 5(11) 2, 12, 13, 14, 15, 16, 17, 17n, 18, 22, 26, 27, 28, 32, 37, 1-2a
49 U. S. C. § 20b 35

Interstate Commerce Commission Rule:
49 C. F. R. § 52.3 ..... 27n, 2a

Ill. Rev. Stat. § 157.146 ..... 25n

Ind. Stat. [Burns] 55-2409(2) 25n

Missouri Rev. Stat. (1959):
Section 351.055 ..... 7, 8n, 23, 3a
Section 351.270 ..... 24, 25n, 4a
Section 351.425 ..... 23, 4a
Section 351.458 ..... 23, 4a
Section 351.690 ..... 22, 5a

PAGE

MISCELLANEOUS:

Beck, *Estoppel Against Inconsistent Positions In Judicial Proceedings*, 9 Brooklyn L. Rev. 245 (1940) 31n

Black's Law Dictionary (4th Ed.) 19n

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11 Fletcher Cyclopedia Corporations (1958 Rev. Vol.) §5087 ..... 5n

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National Transportation Policy, S. Rep. 445, Committee on Interstate and Foreign Commerce, June 26, 1961, 87th Cong. 1st Sess. 36

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Opinion of Attorney General, December 14, 1948, Annual Report of Attorney General of New York (1948), p. 229 ..... 25n

Suggestions to Attorneys Concerning Appellate Rules and Practice, by Robert C. Tucker, Clerk (With the approval of the Court [of Appeals for the Eighth Circuit]) 17n

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the district court (R. 90-98) is reported at 233 F. Supp. 747. The opinion of the court of appeals (R. 135-158) is reported at 359 F. 2d 106.

Jurisdiction

The judgment of the court of appeals was entered on April 19, 1966 (R. 159). The petition for a writ of certiorari was filed on July 15, 1966, and was granted on October 10, 1966 (R. 161). The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

Statutes Involved

The principal statute involved is Section 5(11) of the Interstate Commerce Act, 54 Stat. 898, 908 (1940), 49 U. S. C. § 5(11) (1959), which provides, *inter alia*, that voluntary consolidations of railroads must have the assent

> "of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote. . . ."

Other statutes involved are Section 5(2) of the Interstate Commerce Act, 54 Stat. 898, 905 (1940), 49 U. S. C. § 5(2) (1959), and Chapter 351 of the Missouri Revised Statutes (1959).

The pertinent provisions of the foregoing statutes are set forth in the Appendix to this Brief.

Questions Presented

1. Whether charter provisions for class voting, mandated by a plan of bankruptcy reorganization and made valid and controlling under state law, are to be disregarded in determining the "vote required under applicable State law" for purposes of § 5(11) of the Interstate Commerce Act.

2. Whether a determination by the district court that a class vote is the vote "required under applicable State law", which determination is not overturned or found by the court of appeals to be impermissible, defines and settles the vote under § 5(11) of the Interstate Commerce Act for effecting a voluntary consolidation of railroads.

3. Whether Missouri Pacific Railroad and its controlling stockholder, having successfully maintained in an earlier

proceeding before the Interstate Commerce Commission that class voting is required for mergers and consolidations of Missouri Pacific, may now be heard to reverse their position and maintain the contrary in this case.

4. Whether a proposed transaction is brought within the scope of § 5(2) of the Interstate Commerce Act simply by being cast in the form of a consolidation of a railroad with one of its subsidiaries, when the purpose and substance of the proposal are to enrich the majority preferred stockholder of the railroad by stripping the common stockholders of their legal rights and equity granted under a plan of bankruptcy reorganization and embodied in the charter of the railroad.

Statement of the Case

Summary:

This case involves an attempt by Mississippi River Fuel Corporation ("Mississippi"), the controlling and majority preferred stockholder of Missouri Pacific Railroad Company ("MoPac"), to enrich itself by stripping the MoPac common stockholders of more than $250,000,000 of their present equity and of their rights to future earnings of MoPac. Mississippi seeks to accomplish these appropriations under the Interstate Commerce Act.

The MoPac preferred stock consists of about 1,850,000 Class A shares with an equity permanently limited to $185,000,000 ($100 a share). The MoPac common stock consists of about 40,000 Class B shares with an equity now worth more than $260,000,000 ($6,500 a share) and growing rapidly.

Since each share of each class has one vote, the Class A has the propenderant voting power. Mississippi owns 58% of the Class A shares, carrying 57% of the total voting

power. Mississippi alone elects and dominates the entire board of MoPac.

The respective legal and property rights of the two classes of MoPac stock were established ten years ago by a plan of bankruptcy reorganization, which protected such rights by requiring an amendment to the MoPac charter prohibiting any alteration or change of class rights except with the separate consent of a majority of each class.

Mississippi now attempts to appropriate the Class B's property and rights through the device of a "plan of consolidation" of MoPac and one of MoPac's subsidiaries. The device is to cancel all the MoPac Class A and Class B shares and replace each share of each class with four identical shares of common stock of a new company created for the purpose. This proposal would strip the Class B stockholders of their special rights under the MoPac charter, would deprive them of more than $250,000,000, and would reduce their present ownership of 100% of the residual earnings and equity to 2%. Mississippi would gain most of what would be taken from the Class B stockholders.

Mississippi contends that the Class B stockholders are not entitled to exercise their class voting rights on the proposed plan of consolidation.

Betty Levin and other Class B stockholders (petitioners in this Court) sued to protect their class voting and property rights. Mississippi *et al.* (respondents in this Court) moved to dismiss the complaints.

The district court upheld the class voting rights of the Class B stockholders, and denied the motions to dismiss the complaints. On certified appeal by Mississippi *et al.*, the court of appeals reversed. The Class B stockholders seek in this Court reversal of the judgment of the court of appeals, and affirmance of the judgment of the district court upholding the class voting rights.

The Class A and Class B Stock of MoPac

MoPac was in reorganization proceedings under § 77 of the Bankruptcy Act for 23 years. In the later stages of the reorganization proceedings, it became clear that all creditors' claims could be satisfied in full, and, indeed, considerable equity began to mature for the old stockholders.

The prospective treatment of the old preferred and common stockholders became a major issue. The problem was finally resolved in 1955 by the fourth and final plan of reorganization. Under that plan, all the old stock was cancelled; about 1,850,000 shares of new Class A stock were issued to the old preferred stockholders; and about 40,000 shares of new Class B stock were issued to the old common stockholders.[1]

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[1] The outstanding stock of the bankrupt railroad had consisted of about 700,000 shares of $100 par 5% non-participating cumulative preferred stock, and 800,000 shares of common stock. Under the plan of reorganization, the old preferred stockholders, for their 700,000 shares (par value $70,000,000) and $115,000,000 of dividends accumulated during the bankruptcy, received $185,000,000 stated value of new preferred stock—that is, 1,850,000 shares of Class A, which were declared to "compensate them [the old preferred stockholders] fully for the rights surrendered." *Missouri Pac. R. Co. Reorganization*, 290 ICC 477, 597 (1954). (The Class A was named "Common", although it is a preferred stock. See 11 *Fletcher Cyclopedia Corporations* (1958 Rev. Vol.) § 5087; *In re Louisville Gas & Electric Co.*, 77 F. Supp. 176, 178 (D. Del. 1948).)

The residual equity of $4,000,000 at the time of the reorganization was allotted to the old common stockholders. About 40,000 shares of Class B common stock, entitled to "all residual earnings" (290 ICC at 600), were issued on the basis of 1 Class B share for every 20 shares of old common stock. See Tables of Distribution, 290 ICC at 642-44; *In re Missouri Pac. R. Co.*, 129 F. Supp. 392, 403 (E. D. Mo. 1955), *aff'd*, 225 F. 2d 761 (8 Cir. 1955), *cert. denied*, 350 U. S. 959 (1956).

The Class A is expressly limited to non-cumulative dividends not to exceed a maximum of $5 per share per year and to assets on liquidation not to exceed $100 per share (R. 11-13). The Class A's equity in MoPac assets is thus fixed and limited to $185,000,000.

The Class B stock is the residual equity common stock, and, as such, is entitled to all the remaining earnings and assets without limit (R. 11-13, 96, 136). As a consequence of MoPac's mounting earnings in the decade since the reorganization, the Class B's equity has grown to a present value of about $260,000,000. That amounts to $6,500 per share of Class B stock.[2]

Residual earnings on the Class B stock—that is, earnings remaining after payment of the maximum annual dividend of $5 per share on the Class A stock—currently exceed $17,000,000 a year, which amounts to $430 per share of Class B stock.[3]

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[2] The MoPac consolidated balance sheet filed with the ICC for September 30, 1966, reported total shareholders' equity of $444,382,052. The Class A equity remains fixed and limited at $185,110,200 ($100 per share on 1,851,102 shares outstanding); the residue of $259,271,852, and all future increases in shareholders' equity, accrue entirely to the Class B (39,731 shares outstanding). Thus the Class B has 58% of the present total equity as against 42% for the Class A, and the gap continues to widen as the total equity continues to increase.

[3] The MoPac annual report and income statement filed with the ICC for 1965 reported consolidated net income of $26,301,000. After full dividends of $9,238,000 on the Class A stock (at the maximum rate of $5 per share), the residual income of $17,063,000 accrued entirely to the Class B stock. For the first nine months of 1966, MoPac reported higher income than for the corresponding period of 1965.

The Class Voting Rights

To prevent the Class A from using its preponderant voting power to modify or destroy the rights of the Class B stockholders, the plan of reorganization required that the MoPac charter be amended to provide for protective class voting.

The class voting requirement was first stipulated by the parties who negotiated the fourth and final plan of reorganization. Their stipulation was adopted by the ICC. In the ICC's Submission of the Plan of Reorganization to the parties entitled to vote for acceptance or rejection of the plan, the protective class voting provision was set forth three times. The district court found the charter amendments to be in accordance with the true intent and requirements of the plan of reorganization, and directed that they be executed and filed with the Secretary of State of Missouri.[4]

Accordingly, pursuant to the directions of the ICC, the courts, and the security holders, the charter of MoPac was amended in 1956 by the addition of the following Article VII D(3):

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[4] Agreement dated May 6, 1954, p. 2, annexed to Trustee's Petition dated May 10, 1954, filed with ICC May 12, 1954 (Trustee's Ex. 3 in Vol. I-A of Record in 225 F. 2d 761); 290 ICC at 493, 598, 665; Submission of Plan of Reorganization (21), (118), (204) (in Vol. V of said Record); *Consummation Order and Final Decree of District Court* [Order No. 4701A], March 1, 1956, pp. 9, 16; R. 51-52. Holders of 95% of the old preferred stock and 99.6% of the old common stock voting on the plan of reorganization voted to accept it (R. 51).

"The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII, [5] (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock[6] or (d) amend or eliminate any of the provisions of this paragraph (3)."

Mississippi's Acquisition of Control

Mississippi was not a stockholder of MoPac at the time the reorganization was consummated. Mississippi first appeared on the scene in 1959, when it began to acquire MoPac Class A stock.

By 1963, Mississippi had acquired more than 1,071,895 Class A shares—58% of the Class A stock and 57% of the aggregate voting power—enabling Mississippi absolutely to dominate the entire board of directors of MoPac

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[5] Section C of Article VII directs the issuance of the shares of Class A stock and Class B stock pursuant to the plan of reorganization. Section B of Article VII provides that the total authorized capital stock shall consist of 3,000,000 shares of Class A and 1,000,000 shares of Class B stock.

[6] This language parallels the language of the Missouri statute § 351.055 R.S. Mo.: "The articles of incorporation shall set forth . . . the preferences, qualifications, limitations, restrictions, and the special or relative rights of . . . the shares of each class. . . ."

and its subsidiaries (R. 46-47, 52). Mississippi has continued to acquire additional Class A stock to date, but has no Class B stock of MoPac (R. 47).

The Proposed "Plan of Consolidation"

In December 1963, MoPac's directors (all elected by Mississippi) proposed a "plan of consolidation" of MoPac with MoPac's 83%-owned subsidiary, The Texas and Pacific Railway Company ("T&P").

Not long before, MoPac had seriously considered a merger with T&P. After careful study, the MoPac directors (six of whom are still on the board) unanimously rejected the merger as economically undesirable because, among other reasons, both railroads were already operating jointly at all common points and the merger would have been end-to-end, thus not producing the economies often realized in mergers of parallel lines (R. 55, 46, 9).

Under Mississippi's "plan of consolidation", each share of MoPac stock of both classes, without distinction between the Class A (1,851,102 shares) and the Class B (39,731 shares), would be surrendered for four shares of a single class of common stock of a new corporation created for the purpose. MoPac and T&P [7] would be consolidated with the new corporation, which would be the surviving corporate entity (R. 52, 53, 128-129).

It is self-evident that eliminating the present Class A and Class B stocks and replacing them with a single class

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[7] Each share of T&P's single class of stock (445,464 shares) would be surrendered for 4.8 shares of the new corporation's common stock. The new shares issued for MoPac's majority holdings of T&P stock would be held as treasury stock by the new corporation. As of December 31, 1965, MoPac had increased its holdings of T&P stock to 85.6%, thus reducing the minority (publicly-held) stock to 14.4%, or about 64,147 shares. Statistical Supplement to MoPac Annual Report for 1965, p. 11.

of common stock would "alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock [and] of the Class B Stock" (MoPac charter, Article VII D(3)(c)). The Class A stock, now limited in earnings and equity, would be exchanged for stock carrying an unlimited, fully-participating interest in the consolidated enterprise. The Class B stockholders would lose their exclusive rights to the residual earnings and assets, and their protective rights would be eliminated.

Moreover, each share of Class A stock, having a ceiling value of $100, would receive the same number of shares in the consolidated corporation as would each share of Class B stock, although each Class B share has a present value of $6,500—at least 65 times as great as that of each Class A share. And each Class A share, now limited to maximum dividends of $5 a year, would receive the same treatment as each Class B share currently earning $430 a year—86 times as much as the maximum earnings applicable to the Class A share.

While the present equity of the Class B stock is 58% of the total (*supra*, n. 2), and that percentage is constantly increasing, the exchanges under Mississippi's proposed plan would shrink and freeze the Class B stockholders' equity to a permanent 2% of the consolidated corporation. The Class B stockholders would immediately be deprived of more than $250,000,000.[8]

The impact upon the Class B's share in MoPac's earnings would be no less disastrous. Residual earnings on the Class B stock currently exceed $17,000,000 a year,

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[8] Their present residual equity is $260,000,000. Mississippi's plan would allot them 2% of the present total stockholders' equity of $444,000,000 (*supra*, n. 2), or about $8,800,000. The addition of the T&P assets represented by the T&P minority (publicly-held) stock would not materially affect the consequences of the proposed plan to the Class B stockholders.

i.e., $430 a share (*supra*, n. 3). Under Mississippi's proposed plan, the annual share of the Class B stock in MoPac's earnings would be reduced from $17,000,000 to $520,000 (*i.e.*, 2% of the current total earnings of $26,000,000). The Class A stockholders would appropriate to themselves (principally Mississippi) about $16,480,000 of each year's earnings—assuming continuing earnings of the railroad—that now belong to the Class B stockholders.

In December 1963, Mississippi's chief executive officer was the chairman of MoPac's Executive Committee and a member of T&P's Executive Committee; another of Mississippi's directors was the President of both MoPac and T&P; six of Mississippi's directors were on the board of MoPac and five were on the board of T&P (R. 46-47).

In December 1963, Mississippi caused MoPac to announce that the "plan of consolidation" would be submitted to the MoPac stockholders for their approval by a two-thirds aggregate vote, not by a separate class vote (R. 53, 91).

In January 1964, MoPac and T&P filed a joint application with the ICC for approval of the plan under § 5(2), and of the issuance of new stock under § 20a, of the Interstate Commerce Act. The application states that the plan is subject to approval by two-thirds of all the MoPac stock (R. 91).

The Present Litigation

Betty Levin, owning 85 shares of MoPac Class B stock, brought a diversity action in the federal district court against Mississippi, MoPac, T&P, and MoPac's directors, to enjoin the proposed "plan of consolidation" and to obtain, *inter alia*, a declaratory judgment that the plan could

not be adopted without the separate consent of a majority of the Class B stock.[9]

Mississippi *et al.* moved to dismiss the complaint on the ground, *inter alia*, that separate Class B consent is not required for adoption of the proposed plan (R. 68-69).

The district court considered only the class voting issue (R. 78-79, 91, 98).[10]

The district court concluded as follows:

(1) Since the MoPac charter prohibits any change of class rights without separate class consent, and since the proposed plan would "plainly and obviously" change class rights, class voting is required (R. 93-94, 97).

(2) The "different vote [that] is required under applicable State law" (49 U.S.C. § 5(11)) is the class vote prescribed by the charter, since the charter provision is decisive under State law (R. 94).

The district court therefore denied the motion to dismiss the complaint (R. 98).

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[9] The parties are named and described at R. 44-47. The Levin action was consolidated for limited purposes with two other actions brought in the same district court by other Class B stockholders (R. 71), including Alleghany Corporation, which owns about 51% of the Class B stock and is a petitioner in No. 359. The three actions, although different in many respects, seek the same declaratory judgment as to class voting (R. 91).

[10] This issue is not within the so-called primary jurisdiction of the ICC. See *Great Northern R. Co.* v. *Merchants Elev. Co.*, 259 U. S. 285 (1922). Since a majority of the Class B stock is owned by plaintiffs (petitioners in this Court) opposing the proposed plan, if separate Class B consent were found to be required, that would be the end of the plan, the other issues (or most of them) need not be considered, and futile proceedings before the ICC would be obviated. See *Southwestern S. & M. Co.* v. *River Terminals Corp.*, 360 U.S. 411, 415 (1959).

The order of the district court was certified and defendants' appeal to the court of appeals was allowed under 28 U.S.C. § 1292 (b) (R. 102, 103). The appeal was argued on May 6, 1965.

On April 19, 1966, the court of appeals reversed (R. 135-158).

The petitioner now seeks reversal of the judgment of the court of appeals and affirmance of the judgment of the district court.

Summary of Argument

1. The MoPac charter prohibits any alteration or change of class rights without the separate consent of a majority of each class of stock. This class voting requirement was mandated by a plan of bankruptcy reorganization approved by the ICC, federal courts, and the parties. The district court found that Mississippi's proposed plan would alter and change class rights, and therefore it is subject to the class voting requirement of the charter. The district court determined that the class vote thus required by the charter is the vote required under Missouri law and is therefore the vote prescribed by § 5(11) of the Interstate Commerce Act.

2. The Missouri statutes provide that corporate charters shall set forth the special and relative rights of each class of stock. The MoPac charter accordingly sets forth the class rights, including the provisions for class voting. Such class voting provisions in the charter are conclusive under Missouri law. The district court was correct in concluding that the class vote prescribed by the charter is the vote required under applicable Missouri law.

3. The determination of state law by the experienced district judge was not overturned by the court of appeals. The long-established rule of the Eighth Circuit that the court of appeals will accept permissible determinations of

state law by the district courts called for an affirmance of the district court's determination that class voting is required under applicable Missouri law. Instead, however, the court of appeals erroneously applied the majority-vote provision of § 5(11), which is applicable only when there is no different vote required under applicable State law.

4. The decision of the court of appeals, in disregarding charter provisions for stockholder voting for purposes of § 5(11), (a) contravenes long-established observance of such charter provisions in determining the vote required for consolidations, (b) misconceives national transportation policy, and (c) will, if not reversed, deprive the ICC, the public, and carriers of the important tool of charter provisions for stockholder voting to implement and facilitate plans of railroad reorganization.

5. The matter of class voting was raised before the ICC by the respondents not long before they proposed the plan of consolidation here in issue. The respondents successfully maintained that class voting is required for mergers and consolidations of MoPac, by virtue of the charter provisions. The respondents are barred from taking a contrary position in this case, particularly since their purpose in now repudiating their former position is to strip the Class B stockholders of more than $250,000,000 plus other valuable property and rights. *Davis* v. *Wakelee,* 156 U. S. 680 (1895).

6. The proposed plan of consolidation is not within the scope of § 5(2) of the Interstate Commerce Act, because the primary purpose of the plan is not to effect a consolidation but to enrich the Class A stockholders at the expense of the Class B stockholders. *County of Marin* v. *United States,* 356 U. S. 412 (1958).

ARGUMENT

I

Section 5(11) of The Interstate Commerce Act Conditions Approval Of The Proposed Plan Upon The Separate Consent Of A Majority Of The Class B Stock.

A. Railroad Unifications Under the Interstate Commerce Act Are Subject to Stockholder Assent by the Vote of a "Majority, Unless a Different Vote Is Required Under Applicable State Law" (49 U.S.C. § 5(11)).

A merger or consolidation "of two carriers may be approved by the Interstate Commerce Commission only if it originates as a voluntary proposal by the merging carriers." *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 310 (1954).

A voluntary proposal for merger or consolidation must have

> "the assent . . . of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote. . . ." 49 U.S.C. § 5(11).

The proposal must also comply with two other conditions, prescribed by § 5(2)(b): It must be "consistent with the public interest", and it must be "just and reasonable".

Each of the three conditions must be fulfilled. *Schwabacher* v. *United States*, 334 U.S. 182, 194 (1948). If any one of them is not fulfilled, the merger or consolidation can not be effected.

Only the condition as to stockholder voting is in issue here. That condition is not to be confused with the condition of fairness (*i.e.*, that the proposal be "just and reasonable"), although the court of appeals did confuse

them when it suggested that the petitioner's purpose in describing the proposed plan was to show it to be unfair (R. 145).

The petitioner did not seek anything that might encroach upon the ICC's jurisdiction. The petitioner simply sought to demonstrate that the proposed plan would alter and change class rights and therefore is subject to the requirement of class voting.

The district court, perceiving the purpose of the petitioner, saw its own task as a search for the answer to the "ultimate question" in this case: Does the proposed plan involve altering or changing class rights or eliminating any of the class voting provisions of the charter?

> "If it does, separate majorities of both classes are required for approval by terms of the Articles of Association, adopted pursuant to the plan of reorganization of MoPac . . ." (R. 94 [233 F. Supp. at 750]).

The district court did not dwell on the issue of fairness or on the fact that the respondents' device took the form of a consolidation. The district court's determination was straightforward: Class voting is required by the charter because the proposal would clearly alter and change class rights and would eliminate the class voting provisions themselves.

The district court, applying § 5(11), determined that the class vote required by the charter is the "different vote . . . required under applicable [Missouri] law".

The court of appeals did not overturn the district court's determination of Missouri law. Nowhere in its opinion did the court of appeals say that the district court's determination of Missouri law is not a permissible determination.

Under the long-established rule of the Eighth Circuit that the court of appeals will accept the permissible deter-

mination of a district court as to state law, affirmance of the district court's order was called for. [11]

But the court of appeals declined to observe its own rule in this case. Instead of accepting the district court's determination as to state law, the court of appeals applied the majority-vote provision of § 5(11).[12]

In support of its novel construction of § 5(11) and its unique departure from its own rule, the court of appeals said that its "difference with the district court relates to this [§ 5(11)] statute and the national transportation policy." R. 158 (359 F. 2d at 120).

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[11] *Homolla* v. *Gluck*, 248 F. 2d 731, 735 (8 Cir. 1957).

See SUGGESTIONS TO ATTORNEYS CONCERNING APPELLATE RULES AND PRACTICE, by Robert C. Tucker, Clerk (WITH THE APPROVAL OF THE COURT [OF APPEALS FOR THE EIGHTH CIRCUIT]), p. 6. The same three-judge panel that decided this case applied that Eighth Circuit rule at least four times in the last year alone. *Merrick* v. *Allstate Ins. Co.*, 349 F. 2d 279, 282 (8 Cir. 1965), *cert. denied*, 382 U. S. 957 (1966); *Lesser* v. *Wm. Holliday Cord Assoc. Inc.*, 349 F. 2d 490, 493 (8 Cir. 1965); *United States Fire Ins. Co.* v. *Cannon*, 349 F. 2d 941, 944-45 (8 Cir. 1965); *Hedberg* v. *State Farm Mut. Auto. Ins. Co.*, 350 F. 2d 924, 932-33 (8 Cir. 1965).

[12] The court of appeals said that the majority-vote provision of § 5(11) is the "primary standard" because the statute "speaks" of it "in the first instance", i.e., ahead of the "different vote [that] is required under applicable State law". This sequence, said the court, makes the latter vote the "exception" to the majority-vote "rule". (R. 148, 157 [359 F. 2d at 114, 119].)

History and the prevalence of different votes required under State law, however, lead to the conclusion that if either type of vote is to be characterized as the rule, it would be the commonly-found "different vote . . . required under applicable State law", since the majority vote is applicable only in those comparatively infrequent instances where there is no different vote required under State law.

Despite the district court's determination that the class vote is the vote required under applicable Missouri law, and despite the fact that the court of appeals did not overturn that determination, the court of appeals nevertheless said that its doubts led it to apply the majority-vote provision of § 5(11).

Consideration of § 5(11) requires a determination of the vote required under applicable State law. The first step is to examine the charter provisions and their relationship to relevant State law.

B. The MoPac Charter Prohibits Any Alteration or Change of Class Rights Except With the Separate Consent of Each Class of Stock. The Proposed Plan Would Alter and Change Class Rights, and Is Therefore Subject to the Class Voting Requirement.

Article VII D(3) of the MoPac charter provides that MoPac shall not, without the consent of a separate majority of each class of stock,

> "(c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3)."

The foregoing provisions secure and stabilize the relationship between the Class A and the Class B stockholders as fixed by the plan of reorganization of MoPac.

To the district court, those charter provisions were abundantly clear. The district court said:

> "The article does not attempt to set out specific types or methods of company action which might be employed to alter or change the relative rights. In plain language, it prohibits, unless class voting is observed, company action, without limitation and without specification as to type or method when such action 'alter(s) or change(s) the preferences, qualifications, limitations, restrictions and special or rel-

ative rights of the Class A Stock or of the Class B Stock . . .' " R. 93 (233 F. Supp. at 749).[18]

The district court properly did not find it necessary or appropriate to give weight to the type of the device used to alter or change the class rights. Neither mergers, consolidations, nor any other type of action is exempt from the requirement of class voting, if the action would alter or change class rights.

MoPac and Mississippi, however, contend that Article VII D(3) does not apply to the proposed plan because clause "(c)" of the Article does not specify consolidations.

If that contention were adopted, clause "(c)" would be rendered totally meaningless, since clause "(c)" does not specify any other particular type of action either, and therefore, to follow respondents' contention, no particular action would require class voting because no particular action is specified.

The reason that no particular action is specified is, as the district court recognized, that the class voting requirement covers any and all company action—without enumeration, limitation, exception, or exclusion—that would alter or change class rights. The respondents would con-

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[18] The word "alter" denotes a modification of a subject-matter that continues objectively the same. The word "change" denotes the substitution of an entirely different thing. *Black's Law Dictionary* (4th Ed.) p. 103; *Cross* v. *Nee*, 18 F. Supp. 589, 594 (W. D. Mo. 1937); *Levin* v. *Hamilton*, 240 Mo. App. 764, 766-7, 218 S. W. 2d 131, 133 (1949).

The class voting provisions of Article VII D(3) protect those "preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock and the Class B Stock" set forth in the six numbered paragraphs of Article VII D (reprinted in full at R. 11-15), dealing with (1) dividends; (2) assets on liquidation; (3) separate class voting; (4) voting except by class or as otherwise provided by law; (5) issuance of authorized but unissued shares; and (6) pre-emptive rights.

strue Article VII D(3) as if it contained a special exception for their present purposes, such as if the Article read "The Company shall not . . . (c) *except by merger or consolidation,* alter or change" the class rights.

There is absolutely no warrant for carving out such an exception for the respondents. When it was intended to exclude particular company actions from the operative effects of a charter provision, those actions were specified. Thus, Article VII D(2), concerning rights to assets on liquidation, provides that no "merger or consolidation. . . . sale, transfer or lease . . . shall be deemed to be a liquidation, dissolution or winding up of the Company." (R. 13.) [14]

The court of appeals notes the respondents' contention that "it is inconceivable that it was intended [in the MoPac plan of reorganization] to give a veto power over a consolidation" to a bare majority of the common stockholders who were given "only a 'possible future equity'" and 2% of the aggregate voting power (R. 149 [359 F.2d at 115]).

It was precisely because

> "[t]he plan would vest the equity in a class of stock having only 2 percent of the voting power, while control of the property will be in the hands of the other 98 percent" (290 ICC at 599),

that protective class voting was essential to the plan of reorganization.

At every stage in the proceedings on the final plan of reorganization, there is evident the special concern of the parties, the ICC, and the court for class voting provisions to protect the common stockholders' rights to all the residual earnings and equity. *Supra,* p. 7.

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[14] The exclusions in Article VII D(2) obviate claims, such as had been made in *Schwabacher, supra,* p. 15, that any of the excluded transactions is tantamount to a liquidation, dissolution or winding up so as to confer the same rights on stockholders under state laws.

Such a protective class voting right is not uncommon. The need for such a right was recently explained by MoPac itself, in connection with its own minority stock interest in the Chicago & Eastern Illinois Railroad, whose charter provision for class voting

> "is characterized by Missouri Pacific as a 'standard protective provision afforded owners of minority stock interests' through which such interests might have an effective voice in matters pertaining to the intrinsic investment value of their stocks, such as, mergers, consolidations and plans for the alteration or modification of the stock." *Missouri Pac. R. Co. — Control — Chicago & Eastern Illinois R. Co.*, —ICC—(1965), Finance Docket No. 21755, February 16, 1965, p. 51, *aff'd, Illinois Central R. Co., et al.* v. *United States, et al.*, — F. Supp. — (N.D. Ill. 1966), No. 65 C 1393, August 4, 1966.

The Chicago & Eastern Illinois Railroad charter provisions for class and cumulative voting were, like MoPac's, part of a plan of bankruptcy reorganization (230 ICC 199, 571). When the controlling class of stockholders of Chicago & Eastern Illinois Railroad later attempted to vitiate those voting rights, the charter provisions were upheld as paramount:

> "When a reorganization plan has been certified by the Interstate Commerce Commission and approved by the court, as has been done in this case, that plan becomes final, is binding upon the debtor and all other interested parties, and must be enforced as written. 11 U.S.C.A. Secs. 205, 624; Denver & R.G.W.R.R. v. Goldman Sachs & Co., 212 F. 2d 627 (10 Cir. 1954)." *Kern* v. *Chicago & Eastern Illinois Railroad Co.*, 31 Ill. App. 2d 300, 307, 175 N.E. 2d 408, 411 (1961).

What is true for MoPac, as the owner of a minority interest in a minority class of preferred stock of Chicago & Eastern Illinois Railroad, is no less true for MoPac's own common stockholders.

Mississippi, too, conceded the significance of the class voting provisions when it exploited them to induce other Class A stockholders to part with their Class A stock.[15]

The plan of consolidation now proposed by Mississippi could not better demonstrate the need for the protective class voting provisions of the MoPac charter, nor fall more squarely within their terms.

We turn now to the role of the charter provisions under Missouri law.

C. The Class Vote Required by the MoPac Charter Is the Vote "Required Under Applicable [Missouri] Law" (49 U. S. C. § 5 (11)).

Section 5(11) of the Interstate Commerce Act requires a determination of what "different vote is required under applicable State law".

Both lower courts held that the applicable State law is Chapter 351 of the Missouri Revised Statutes (R. 94, 150-153; see § 351.690(3), Mo.R.S., *infra*, p. 5a).

The Missouri statutory pattern is the not uncommon one of providing minimum voting requirements that may be augmented by charter provisions.

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[15]In 1962, Mississippi acquired its biggest single block of Class A stock—321,795 shares—through an exchange offer to the other Class A stockholders. To induce them to exchange their Class A stock for some newly-issued Mississippi common stock, Mississippi emphasized the permanent limitations on the Class A stock (*viz.*, that it can never participate in MoPac's earnings and assets beyond annual non-cumulative dividends of $5 per share and $100 per share on liquidation), contrasted with the unlimited residual rights of the Class B stock; and Mississippi pointed out that "a separate majority vote of each class of stock is required . . . to alter or change the preferences, qualifications, limitations, restrictions or special or relative rights, including voting rights, of the two classes of stock." R. 59-60, Prospectus p. 11.

For a consolidation of MoPac and T&P, the starting point is § 351.458:

> "1. One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized:
>
> "(1) Each domestic corporation shall comply with the provisions of this chapter [351] with respect to the merger or consolidation, as the case may be, of domestic corporations * * *."[16]

Compliance by the Missouri corporation requires, according to § 351.425,

> "* * * the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote. * * *"

The "at least two-thirds" requirement of § 351.425 is not the only requirement; it is but the minimum requirement. The possibility of greater or additional voting requirements is envisaged. Such augmented requirements may be incorporated in charter provisions pursuant to § 351.055:

> "The articles of incorporation shall set forth:
> * * *
>
> "(3) . . . the preferences, qualifications, limitations, restrictions, and the special or relative rights . . . in respect of the shares of each class * * *
>
> "(9) Any other provisions, not inconsistent with law, which the incorporators may choose to insert."

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[16] MoPac is a Missouri corporation, incorporated in 1917; T&P is a federal corporation chartered by the Forty-First Congress on March 3, 1871, 16 Stat. 573 (as supplemented by several acts cited in the latest, Public Law 87-527, July 10, 1962, 76 Stat. 142). The term "foreign corporation" means any corporation organized outside of Missouri, including a federal railroad corporation. *Smith* v. *Pacific R.R.*, 61 Mo. 17, 18 (1875).

The validity of charter provisions for class voting is recognized by § 351.270:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

It is accepted practice in Missouri for corporate charters to contain provisions for class voting on corporate actions for which class voting is not otherwise specified by statute.[17] But the respondents nevertheless contend that such charter provisions for class voting are not valid because, apart from the charter provisions, there is no statute specifying class voting.

The respondents' contention unavoidably entangles them in self-contradiction. On the one hand, they contend that charter provisions for class voting are valid only if there is a statute specifying class voting quite apart from the charter provisions. On the other hand, they concede (indeed they would probably insist) that class voting is required for the issuance of any more of the authorized Class B shares, by virtue of the charter provisions for class voting (MoPac Brief in Opposition to Petition for Certiorari, p. 15)—but apart from the charter provisions for class vot-

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[17] See *Missouri Business Enterprises*, Practice Handbook No. 6, Missouri Bar Continuing Legal Education Committee (1962), § 8.14, p. 217, Article III (b)8.

MoPac's own original (1917) charter contained a provision, Article VII (6), for a class vote of the preferred stock on any increase in the amount of authorized preferred stock, although for almost thirty years thereafter there was no applicable statute calling for such a class vote.

ing, there is no Missouri statute specifying class voting on such corporate action.[18]

The respondents then contend—and the court of appeals agreed (R. 157)—that (a) even if the class voting provisions

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[18] The respondents' contention is refuted by further analysis and authority:

Section 351.270 refers to charter provisions for "class or series" voting. No other section of Chapter 351 even refers to series voting, much less requires it for any corporate action. Respondents' construction would thus render utterly meaningless the reference to series voting in § 351.270. If the reference to series voting is not to be a nullity, it can only mean that charter provisions requiring series voting are valid and controlling, although series voting is not otherwise required by any statute for any corporate action. A parity of reasoning applies to charter provisions requiring class voting for corporate action although class voting is not otherwise required by statute for such action. See Haller, *Corporate Control under the Illinois Business Corporation Act through Charter and By-Law Provisions*, 32 Chicago Bar Rec. 411, 413 (1951) (describing the virtually identical Illinois counterpart (Ill. Rev. Stat. § 157.146) of Missouri's § 351.270).

The respondents had no difficulty with the charter provisions for class voting when they insisted to the ICC in 1961 that such provisions of the MoPac charter apply to mergers and consolidations of MoPac (*infra*, pp. 29-30). Similarly, they successfully claimed MoPac's right to a class vote for mergers and consolidations of the Chicago & Eastern Illinois Railroad by virtue of the latter's charter provision for class voting, although the applicable Indiana statute (§ 55-2409(2)) does not require such a class vote in the absence of a charter provision for class voting. *Illinois Central R. Co.* v. *United States, et al., supra*, p. 21, at 4, 19-20. See also *Standard Power & Light Corp.* v. *Investment Associates Inc.*, 29 Del. Ch. 593, 51 A. 2d 572 (1947) (giving full effect to charter provisions for class voting for the election of directors, where there was no statute otherwise specifying class voting for the election of directors); *Opinion of Attorney General*, December 14, 1948, Annual Report of Attorney General of New York (1948), p. 229 (recognizing the validity of charter provisions for class voting not otherwise specified by statute).

of the MoPac charter call for a class vote on the proposed plan of consolidation, and (b) even if such class vote is valid and controlling under applicable Missouri law, nevertheless (c) such class vote is not "required" for purposes of § 5(11), because such class vote appears in charter provisions that are not mandated but are only authorized by Missouri law.

To make that contention is to fly in the face of the plain fact that, once a vote has been prescribed by authorized charter provisions, such vote is as much the vote required under applicable State law as if it were mandated by the words of a statute alone or by the words of a mandated charter provision.[19]

Class voting required under applicable State law has been uniformly recognized as the vote required by § 5(11), regardless of whether the class vote is specified by state

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[19] Charter provisions governing stockholder voting are rarely, if ever, themselves *required* under state law; rather, they are *authorized* and, if adopted, the *vote* they prescribe then becomes the *vote* required.

In re Boyd, 213 F. 774 (2 Cir. 1914), and *Huey* v. *Waldrop*, 141 Ala. 318, 37 So. 380 (1904), cited by the court of appeals (R. 157), are not to the contrary. The first recognizes that the word "required" does not have the same meaning as the three words "required or permitted" when used in the same statute; the second says that "required" means "commanded". Merely to define the word "required" does not contribute to determining the vote that is required in this case.

To the point, however, is *Sellers* v. *Joseph Bancroft Sons & Co.*, 23 Del. Ch. 13, 23-24, 2 A. 2d 108, 112-113 (1938), holding that a voting requirement contained in an authorized charter provision supplants the voting requirement otherwise provided by statute.

statute alone[20] or is required by charter provisions authorized by statute.[21]

The effect of the peculiar construction given to § 5(11) by the court of appeals is to render completely inoperative, for mergers and consolidations under the Interstate Commerce Act, practically all charter provisions for stockholder voting, because practically all such charter provisions are adopted pursuant to state statutes that *authorize* such charter provisions but do not *require* them.

If the decision stands, the immediate consequence will be to deprive the public and the ICC of a tool—charter provisions for stockholder voting—that has long proved invaluable in formulating and implementing railroad reorganizations. It is difficult enough at best to arrive at plans of railroad reorganization that meet with the consent of the parties entitled to vote thereon, and that in addition

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[20] See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182, 202 (1948) (stockholder assent to Pere Marquette Railway merger by vote required under Michigan law, a class vote; see 267 ICC 207, 216 (1947)); *Norfolk & W. R. Co. Merger*, 307 ICC 401, 415 (1959) (class vote under Virginia law); *Norfolk & W. R. Co. and N.Y., Chicago & St. Louis R. Co. Merger, etc.*, 324 ICC 1, 32-33, 97 (1964) ("Without question, such power [to control with a mathematical certainty Norfolk & Western's merger proposal] can be exerted in situations where the applicable law requires the assent of a majority of each class of stock.").

[21] *Illinois Central R. Co., et al.* v. *United States, et al.*, *supra*, p. 21, at 4, 19-20 (class vote, by virtue of charter provisions of Indiana railroad, recognized as vote required for mergers and consolidations of the railroad); *Chicago & N.W.—Chicago, Milwaukee, St. Paul & Pac. R. Co.* Joint Application [for consolidation] filed June 6, 1966, Finance Docket No. 24182, Ex. B-1, pp. 47, 50, 51 (stockholder assent by class vote required by charter provisions notwithstanding the absence of any statutory requirement for class voting). The ICC's own Rule 52.3 requires that applicants for merger or consolidation comply with their charter provisions for stockholder voting. 49 C. F. R. § 52.3 (*infra*, p. 2a).

satisfy the overriding requirements of § 77 of the Bankruptcy Act that reorganizations be "fair and equitable" and "compatible with the public interest". If charter provisions for stockholder voting can no longer be effectively utilized in arriving at such plans, what has heretofore been merely difficult may now become impossible.

Furthermore, the court of appeals' interpretation of § 5(11) completely undermines what the ICC, the federal courts, and the parties to numerous railroad reorganizations have already achieved in making such charter provisions an integral part of their plans of reorganization now in effect. One such instance is MoPac's own plan of reorganization, in which the keystone of the capital stock structure is the protective class voting provision in the charter.

Another instance is the Chicago & Eastern Illinois Railroad reorganization (230 ICC 199, 571), which produced the charter provision for class voting on which MoPac and Mississippi successfully relied in the *Illinois Central R. Co.* case, *supra*, p. 21.

Public policy and precedent support the continued observance of duly authorized charter provisions for stockholder voting, whether by class or otherwise, in determining the stockholder vote required under applicable State law for voluntary mergers and consolidations under the Interstate Commerce Act.

D. MoPac and Mississippi, Having Successfully Maintained In Recent Proceedings Before the ICC That Separate Class Voting Is Required For Mergers and Consolidations of MoPac, Are Legally Barred From Repudiating Their Position and Maintaining the Contrary In This Case.

In 1961, Alleghany Corporation petitioned the ICC for permission to terminate the independent voting trust covering the MoPac Class B stock in Alleghany's portfolio.[22]

Alleghany asserted that it should be allowed to exercise the normal prerogatives of stock ownership (*viz.*, direct voting rights) because MoPac was then engaged in merger discussions with other railroads, and such proceedings were of vital interest to the MoPac stockholders, particularly the Class B (Petition of Alleghany filed Oct. 6, 1961, p. 7, in *Louisville & J. B. & R. Co. Merger,* Finance Docket No. 18656).

MoPac vigorously opposed Alleghany's petition before the ICC. The chairman of MoPac's Executive Committee was then (as now) also the chairman of the board and chief executive officer of Mississippi, and at least five of Mississippi's officers were already on the board of MoPac.

Their express ground for opposing Alleghany's petition was that a majority of the Class B stock has the power, by virtue of Article VII D(3) of the MoPac charter, to block mergers and consolidations of MoPac. Said MoPac to the ICC:

> "By virtue of the terms and provisions of the Missouri Pacific Railroad Company's Articles of Association the holders of a majority of said Class

[22] The ICC had required Alleghany to trustee its 50% of the MoPac stock when it was issued under the plan of bankruptcy reorganization. *Louisville & J. B. & R. Co. Merger,* Finance Docket No. 18656, ICC Report dated March 2, 1955, Sheet 20, and Order dated May 14, 1957.

> B stock are given an effective veto power over many vital and important corporate actions including such things as mergers, recapitalizations, stock dividends, stock options, stock rights, equity financing, the issuance of convertible securities, and the use of Missouri Pacific stock for exchange in acquisitions of control." (R. 82-83.)

Alleghany, in full agreement with MoPac's recognition of the Class B's voting power, replied as follows:

> "If the Class B stockholders did not possess such rights, the Class A stockholders, having far greater voting power as a class, could strip away all of the rights and value of the Class B stock." (Reply of Alleghany dated Nov. 13, 1961, pp. 1-2, in *Louisville & J. B. & R. Co. Merger,* Finance Docket No. 18656.)

MoPac, in response, did not dissent from Alleghany's reasoning, but merely reiterated its position as to the strategic class voting rights of the Class B stock on

> "such major matters as increases or decreases of capital stock, charter amendments, and consolidations or mergers" (R. 84),

citing as authority for such class voting power *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939). MoPac contended that no change had occurred in the circumstances behind the ICC's original order that the stock be trusteed, and therefore, MoPac urged, the trust should not be terminated. (R. 82-85, 55-56, 33.)

The ICC agreed with MoPac's contention, and denied Alleghany's petition. *Louisville & J.B. & R. Co. Merger,* Finance Docket No. 18656, Order dated March 1, 1962 (unreported). Alleghany acquiesced; no appeal was taken.

Having succeeded then by insisting on the separate class voting rights of the Class B stock on mergers and consolidations, MoPac and Mississippi now take the opposite position, simply because their interests have changed.

Such trifling with the judicial process is not legally permissible. This Court stated the basic principle of judicial estoppel as follows:

> "[W]here a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis* v. *Wakelee*, 156 U.S. 680, 689 (1895).

The purpose of judicial estoppel is to preserve the integrity and dignity of judicial proceedings.[23] The many decisions applying the principle do not record a more flagrant abuse of judicial process than in the present case.[24]

This Court's statement of the principle, quoted above, describes exactly the situation at bar; no essential element is absent.

The court of appeals itself, prior to its decision in this case, had a long and consistent record of applying the principle of judicial estoppel against the very tactic of deliberate self-contradiction that it has just accepted from MoPac and Mississippi. *Officer* v. *J.L. Owens Co.*, 252 F. 337, 342 (8 Cir. 1918); *Axelrod* v. *Osage Oil & Refining Co.*, 29 F. 2d

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[23] See Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132 (1946); Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 Brooklyn L. Rev. 245 (1940).

[24] Mississippi is no more entitled than MoPac to engage in such "double dealing in the administration of justice" (*Wills* v. *Kane*, Grant's Cas. 60, 63 (Pa. 1853)). Mississippi was already dominating MoPac by the time of the ICC proceedings in 1961 (*supra*, p. 29). Moreover, "[t]he law is well settled that shareholders of a corporation are bound by all proceedings to which it is a party, whether they are parties or not, if such proceedings relate to corporate affairs." *Taylor* v. *Fontaine*, 10 S. W. 2d 68, 71 (K. C. [Mo.] App. 1928).

712, 729 (8 Cir. 1928); *City & County of Denver* v. *Denver Tramway Corp.*, 23 F. 2d 287, 296 (8 Cir. 1927); *Sebastian Bridge Dist.* v. *Hedrick*, 4 F. 2d 346, 348 (8 Cir. 1925); *Moore* v. *Beiseker*, 147 F. 367, 375-377 (8 Cir. 1906); *Kansas Union Life Ins. Co.* v. *Burman*, 141 F. 835, 842-843 (8 Cir. 1905).

A more recent episode underscores MoPac's and Mississippi's penchant for reversing their positions to suit their interests of the moment.

In the court of appeals, MoPac and Mississippi argued that § 5(11) prohibits a class vote required by a charter provision. *At the very same time* before the ICC and then a three-judge district court, both MoPac and Mississippi were maintaining exactly the opposite position: that another railroad's charter provision, authorized but not required by state law, gave MoPac (as a minority stockholder in the other railroad) a class vote on mergers and consolidations. The ICC and the three-judge district court agreed with MoPac and Mississippi, *Illinois Central R. Co., et al.* v. *United States, et al., supra,* p. 21, but that did not deter MoPac and Mississippi from reversing their position when it served their interests to do so in this case.

Furthermore, in the court of appeals below, MoPac and Mississippi argued that it would not make sense to permit a class vote that gave a small percentage of stock the power to block mergers and consolidations. But at the very same time, they were successfully claiming just the reverse in the other proceeding: that MoPac, with its holding of just one-third of a minority class of preferred stock constituting a mere 5% of the total stock of Chicago & Eastern Illinois Railroad, could, by class voting, block mergers and consolidations of the latter railroad. *Ibid.*

It is difficult to imagine a more "brazen repudiation by a party of its own acts and assertions" (*Continental Prod-*

ucts Co. v. *Com'r of Int. Rev.*, 66 F. 2d 434, 435 (1 Cir. 1933)).[25]

Whether the respondents are barred at the threshold from "playing 'fast and loose with the courts' ",[26] or whether the class voting issue is considered on the merits in light of the authorities, practice, and policy, the answer was correctly given by the district court:

(1) The class voting provisions of the MoPac charter apply to the proposed plan of consolidation because the plan would alter and change class rights;

(2) the class vote prescribed by the charter is the vote required under applicable Missouri law; and therefore

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[25] Since the purpose of judicial estoppel is to preserve the integrity of judicial proceedings, it does not turn on reliance or identity of parties, so that MoPac and Mississippi may not here repudiate their own position in the Chicago & Eastern Illinois proceedings even though the MoPac Class B stockholders were not direct participants therein. Thus Cardozo, J., said of a defendant who had defeated one plaintiff by obtaining a ruling that the agreement in suit was one of guaranty, and then, in a subsequent action brought by a different plaintiff, sought to contend that the agreement was one not of guaranty but of indemnity:

> "The defendant helped to induce that [first] ruling when the result was to his advantage. We will not change it at his instance now when the result is to his detriment."

Assets Realization Co. v. *Roth*, 226 N. Y. 370, 374, 123 N. E. 743, 744 (1919).

[26] *Scarano* v. *Central R. Co. of New Jersey*, 203 F. 2d 510, 513 (3 Cir. 1953). In *Seatrain Lines Inc.* v. *Pennsylvania R. Co.*, 207 F. 2d 255 (3 Cir. 1953), the court refused to entertain the railroads' assertion on a particular issue, because the same railroads, in a previous case before the ICC, had persuaded the ICC to decide exactly the opposite way on the same issue:

> "This rule of repose is doubly justified in the rare case in which the party who won on an issue in the first case attempts to obtain a contrary ruling in the second litigation, as the railroads are trying to do here." 207 F. 2d at 259.

(3) such class vote is the condition prescribed by § 5(11) as a prerequisite to effectuation of the plan under the Interstate Commerce Act.

II

The proposed plan is not within the scope of Section 5(2) of the Interstate Commerce Act.

This Court ruled in *County of Marin* v. *United States*, 356 U.S. 412 (1958), that the real purpose and substance of a proposed transaction, and not its mere form, will determine whether the transaction comes within the scope of § 5(2) of the Interstate Commerce Act.

The court of appeals in the case at bar ruled to the contrary—that form alone will qualify a transaction under § 5(2) regardless of the true purpose and substance—and it says that this Court so held in *Marin* (R. 148).

In *Marin*, this Court said that "we must examine the proposed transaction in light of the congressional purpose and statutory language." Having thus examined it, this Court found that "the alleged 'acquisition' amounts to little more than a paper transaction"—that what in form was an "acquisition" (requiring ICC approval under § 5(2)) was in substance a split-up. That purpose, according to this Court, "eliminates this transaction from the 'acquisition' language of § 5(2)(a)." 356 U.S. at 418, 419.

Therefore, this Court held, since the transaction in substance and purpose did not comply with the terms and purpose of § 5(2), the ICC should not have entertained the application. This was an applied instance of the Court's statement, a decade earlier, that the Interstate Commerce Act is applicable only to a proposed plan "which is within the scope of the Act". *Schwabacher* v. *United States*, 334 U. S. 182, 194 (1948).

An examination of Mississippi's proposed plan of consolidation suffices to reveal that a union of MoPac and T&P is not the real objective. In fact, such a union had been rejected on economic grounds not long before (*supra*, p. 9).

It is patent that the true purpose and substance of Mississippi's proposed plan are to strip the Class B stockholders of their valuable legal rights and property for the enrichment of the Class A, particularly Mississippi.

Such a purpose "eliminates this transaction from the [consolidation] language of § 5(2)(a)." 356 U. S. at 419.

An earlier instance of a plan that failed to come within the scope of the Interstate Commerce Act is found in *Wood* v. *United States*, 132 F. Supp. 586 (S.D. N.Y. 1955), where the proposed transaction was a plan to alter and modify the capital stock of a railroad. In form, the plan literally complied with § 20b of the Interstate Commerce Act. But the court there ruled that the plan was not within the scope of the Act because the chief purpose was—as in the case at bar—to benefit one class of stockholders at the expense of another:

> "It would not be a constitutional exercise of power under the Interstate Commerce Act and would be in violation of the 'due process' provision of the Fifth Amendment for the Commission to approve a Plan which . . . has as its 'primary objective * * * the elimination of the dividend arrearage on its first preferred stock, thereby making a declaration of immediate dividends on its second preferred and common stock possible' . . ." 132 F. Supp. at 594.

In the case at bar, just as in *Wood*, the "primary objective" of the plan is to enrich one class of stockholders at the expense of another. So too in the case at bar, that same

primary objective bars the plan from the purview of the Interstate Commerce Act.[27]

The court of appeals explained that its ultimate reason for doing what it did in this case is that it was "impressed with the significance of the national transportation policy and its emphasis on railroad consolidation" (R. 157 [359 F.2d at 119]).

A more accurate statement of congressional policy was recently formulated by the ICC:

> "The legislative history of section 5 clearly shows that the Congress did not adopt a policy fostering or encouraging railroad unifications. It was the Transportation Act of 1920, not the Transportation Act of 1940, that embodied a policy favoring railroad consolidations." *Great Northern Pac. & Burl. Lines—Merger—Great Northern R. Co.*, —ICC—(1966), Finance Docket No. 21478, March 31, 1966, p. 89.

The policy adopted by Congress in 1940, which policy has not been changed since, was described by the ICC as follows:

> "The public interest scale is balanced. It is not to be tipped by the slightest presumption for or against merger." *Ibid.*

In 1940, Congress deliberately rejected policies emphasizing railroad unifications, and chose instead to leave all initiative in the matter to the railroads themselves. See *National Transportation Policy*, S. Rep. 445, Committee on Interstate and Foreign Commerce, June 26, 1961, 87th Cong. 1st Sess., pp. 236-241, 252.

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[27] The court of appeals confused this issue of the scope of the Act, just as it confused the class voting issue, with the requirement of fairness. Thus the court of appeals cited *Cleveland C. C. & St. L. Ry. v. Jackson*, 22 F. 2d 509 (6 Cir. 1927) (R. 148), which involved only a question of fairness, not the question of whether the proposed transaction came within the scope of the Interstate Commerce Act.

Nothing in the policy of the 1940 Act derogates in the least from the independent condition that plans of consolidation be approved by the stockholder vote required under applicable State law. Congress decreed exactly where federal law is supreme (namely, over the conditions of public interest and fairness) and exactly where federal law defers to state law and incorporates it by explicit reference—to wit, the voting requirement for stockholder assent. The circuit judges reveal their misconception of this balance between federal and state law when they say that they "take comfort in the fact that, if [they] err in [their] conclusions" as to the voting requirement, the other two conditions must still be met.

But meeting two of the three conditions is not enough. Failure to satisfy any one of the three conditions is fatal to the proposed plan. It is error to subordinate any one of the three conditions just because two others must still be satisfied.

It was only the question of the voting requirement that was considered by the district court. That was the only question certified to and accepted on appeal by the court of appeals. The Class B stockholders are entitled to their full voting rights irrespective of the conditions of fairness and public interest.

* * *

The court of appeals, by its decision, in effect completely disenfranchised the Class B stockholders, in view of the overwhelmingly preponderant voting power of the Class A stockholders.

In reversing the district court, the court of appeals gutted an essential provision of a plan of bankruptcy reorganization. But the court of appeals did not stop there. It did such violence to the Interstate Commerce Act that other plans of railroad reorganization already consummated, and others yet to come, will be plagued by the impairment of their charter provisions for stockholder voting.

Moreover, the court of appeals uprooted the long-established practice of the ICC and the carriers of relying on charter provisions to determine the requisite vote under § 5(11). The decision of the court of appeals will, if left standing, inevitably breed uncertainty and confusion.

The prolonged labors of the ICC, the courts, and the parties, as well as the congressional policy in both the Interstate Commerce Act and the Bankruptcy Act, deserve a better fate.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed with directions that, on remand, the judgment of the district court be affirmed.

Respectfully submitted,

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APPENDIX

Interstate Commerce Act—pertinent provisions.

49 U. S. C. § 5(2):

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

49 U. S. C. § 5(11):

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular

meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

Rule of Interstate Commerce Commission—pertinent provisions.

49 C.F.R. § 52.3:

§ 52.3 Required exhibits

(a) There shall be filed with the original application and as a part thereof, but not with copies, the following exhibits:

(1) As Exhibit A, one or more of the following documents as may be appropriate:

(i) One copy each of the charter or articles of incorporation, and the bylaws and amendments thereof, of each applicant corporation or carrier corporation involved in the proposed transaction duly certified by the appropriate public officer. * * *

(b) There shall be filed with the original application, and with each copy, as a part thereof, the following exhibits:

(1) As Exhibit 1, a copy of all resolutions of directors of each applicant and of each carrier which is a party to the transaction, authenticated by a proper executive officer, authorizing the proposed transaction and, where applicable, the making of the application to the Commission for its approval and authorization; and, if the charter or bylaws of the applicant or carrier require approval of the stockholders, a copy of the resolutions of stockholders authorizing the proposed transaction and the making of the application; all such resolutions to be accompanied by sufficient transcripts of the minutes of meetings of the stockholders or directors of the applicant or carrier to show the number of shares entitled to vote, the number of shares voted for and against the resolutions, and the number of share-votes required to adopt the resolution. * * *

Missouri Revised Statutes (1959)—pertinent provisions.

351.055. Articles of incorporation, contents—

The articles of incorporation shall set forth: * * *

(3) The aggregate number of shares which the corporation shall have the authority to issue, and the number of shares of each class, if any, that are to have a par value and the par value of each share of each such class, and the number of shares of each class, if any, that are to be without par value and also a statement of the preferences, qualifi-

cations, limitations, restrictions, and the special or relative rights including convertible rights, if any, in respect of the shares of each class; * * *

(9) Any other provisions, not inconsistent with law, which the incorporators may choose to insert.

351.270. Vote of concurrence of shareholders shall be controlled by articles of incorporation, when—

Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section.

351.425. Voting by shareholders on plan for merger or consolidation—At each such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed plan of merger or consolidation. The plan of merger or consolidation shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations.

351.458. Merger or consolidation with foreign corporation—procedure.

1. One or more foreign corporations and one or more domestic corporations may be merged or consolidated in the following manner, if such merger or consolidation is permitted by the laws of the state under which each such foreign corporation is organized:

(1) Each domestic corporation shall comply with the provisions of this chapter with respect to the merger or

consolidation, as the case may be, of domestic corporations and each foreign corporation shall comply with the applicable provisions of the laws of the state under which it is organized; * * *

351.690. Applicability of this chapter to existing corporations—The provisions of this chapter shall be applicable to existing corporations as follows: * * *

(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, co-operative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par-value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3).